

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 November 2015

Public Authority: London Borough of Southwark

Address: PO Box 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant requested from the London Borough of Southwark ("the Council") details of the hourly rates it paid to its existing homecare providers. The Council refused to disclose the requested information, citing the exemption in section 43(2) of FOIA.
2. The Commissioner's decision is that the Council has correctly applied section 43(2) to the withheld information and so he does not require it to take any further steps to ensure compliance with the legislation.

Request and response

3. On 14 July 2015 the complainant requested information in the following terms:

"Can I please put in an FOI request to find out the hourly rate that social services commissioning pay the two homecare providers MI Homecare and London Care.

It is the hourly rate which includes the LLW and Travel, If I am not allowed to know the exact hourly rate can I know the nearest or averages that commissioning pay for homecare services.

Would it also be possible to know the hourly rate of other agencies as well, if it is not the same."

4. The Council responded on 21 July 2015 and provided details of average minimum, maximum and average cost rates.

5. On 21 July 2015, the complainant queried why she had not been provided with details of the hourly rates for MI Homecare and London Care. The Council provided the result of its internal review on 29 July 2015. It confirmed that it had previously provided a summary of average hourly rates paid to all providers across the private and voluntary sector. However, in respect of the specific hourly rates for MI Homecare and London Care, it argued that these were exempt from disclosure under section 43(2) of FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 29 July 2015 to complain about the way her request for information had been handled, specifically that the Council had withheld information under section 43(2).
7. The Commissioner considered whether the Council had correctly applied section 43(2) to the information that it withheld.

Reasons for decision

Section 43(2) – Prejudice to commercial interests

8. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.
9. The Council argued that disclosure of the information withheld under section 43(2) would prejudice the commercial interests of the relevant homecare providers covered by the request and its own commercial interests.
10. The Council informed the Commissioner that it had received a number of FOI requests asking for the rates of pay information in relation to domiciliary care. It explained that it would not be practicable to liaise with all providers for every request but that it had consulted with each care provider about such information at some point prior to the request. It consequently believed that the arguments it had presented reflected the care providers' concerns.

Engagement of section 43(2)

11. The Commissioner initially considered whether the relevant criteria for the engagement of section 43(2) were satisfied.

The Council's arguments

12. The Council argued that disclosure of the hourly rates agreed with its care providers would prejudice their commercial interests and also those of the Council. It believed that there would be prejudice to the commercial interests of its contractors because, if the information were disclosed, potential competitors would know how tenders were priced, providing an unfair competitive advantage to those competitors.
13. The Council pointed out that it was due to open all of its care provider contracts to tender in the next 12 months. In light of this, it believed that there was a particular claim by the existing contractors that their commercial rates should not be released into the public domain.
14. The Council went on to argue that prejudice to its commercial interests would occur because if other entities bidding to provide services to the Council were aware that their hourly rate would be made public they would potentially be less likely to bid at all. This would reduce the number of bidders bidding for the Council's procurements.

The Commissioner's view

Prejudice to the commercial interests of the homecare providers

15. The Commissioner initially considered whether section 43(2) was engaged in relation to potential prejudice to the commercial interests of the contractors that had contracted with the Council to provide homecare services.

(i) Applicable interest within the exemption

16. The Commissioner considered whether the prejudice claimed by the Council is relevant to section 43(2). In light of the Council's arguments, the Commissioner is satisfied that the potential prejudice that it has identified relates to the commercial interests of its contractors.

(ii) The nature of the prejudice

17. The Commissioner next went on to consider whether the prejudice being claimed was "real, actual or of substance" ie not trivial and whether there was a causal link between disclosure and the prejudice claimed. The Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant and that there is a relevant causal link between the disclosure of the withheld information and the prejudice to the commercial interests of the contractors.

(iii) The likelihood of prejudice

18. The Council argued that the disclosure of the withheld information would prejudice its contractors' commercial interests.
19. If a public authority claims that prejudice would occur, the Commissioner has taken this to mean that the chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice would occur on only one occasion or affect one person or situation. Alternatively, given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not.
20. The Council informed the Commissioner that it believed that disclosure of the hourly rates contained in its contracts with its homecare providers would prejudice their commercial interests as it would allow potential competitors to know the current hourly rates that they had agreed with the Council. It was of the view that this would give those competitors an unfair commercial advantage, particularly in light of the Council's intention to put the current contracts out to tender in the next 12 months.
21. The Commissioner accepts that the disclosure of the hourly rates that have been agreed with the Council's homecare providers under their current contracts would allow other homecare providers that do not have contracts with the Council at the present time to gain an indication of the sorts of hourly rates that the existing contractors might propose in the forthcoming tendering exercise. This would clearly place those existing contractors at a commercial disadvantage in that tendering exercise. The Commissioner therefore believes that there is sufficient evidence to conclude that disclosure of the withheld information would be more likely than not to prejudice the commercial interests of the Council's current contractors.
22. In light of the above, the Commissioner, accepts that section 43(2) is engaged in respect of prejudice to the Council's contractors' commercial interests. As section 43(2) is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest test

Public interest arguments in favour of maintaining the exemption

23. The Council informed the Commissioner that it believed that the public interest favoured withholding the information because of the effect of disclosure on the commercial interests of its current contractors. It explained that if the information were to be disclosed, potential competitors would know how the contractors might price their future tenders. This would give those competitors an unfair competitive advantage, particularly in light of the imminent opening up of its current homecare provider contracts to public tender.

Public interest arguments in favour of disclosing the information

24. The Commissioner recognises that there is a general public interest in accountability and transparency in relation to the activities of public authorities. In this case, disclosure of the withheld information would increase the Council's accountability and transparency with regard to the contracts it has awarded to existing homecare providers. This would help the public to satisfy itself that public money was being spent appropriately and wisely. This is particularly important in the current economic climate where significant reductions in funding for local authorities means that there is great public concern about spending priorities and local authorities obtaining value for money.
25. The Commissioner also believes that there is a valid argument that the disclosure of details of the contractors' hourly rates would be in the public interest as it would help to enhance competition for public sector contracts. If the rates being paid to contractors under existing contracts were made public this might stimulate interest from other potential contractors when the current contracts are put out to tender in the near future. These contractors might tender at lower rates than the existing contractors and so lead to a reduction in spending on homecare contracts by the Council.

Balance of public interest arguments

26. The Commissioner has accepted the Council's argument that disclosure of the withheld information "would" prejudice the commercial interests of its current contractors. He notes that his guidance on the public interest states that:

"'Would' is a higher standard to meet than 'would be likely'. So, if the authority can establish that prejudice would happen, the argument for maintaining the exemption carries greater weight than if they had only established that prejudice would be likely to happen. This does not mean that where prejudice would happen,

the public interest will always be in favour of the exemption - there may be equally weighty arguments in favour of disclosure - but it does make it more likely that the balance of public interest will be in favour of maintaining the exemption.” (paragraph 54)

27. As a consequence of finding that disclosure “would” prejudice the commercial interests of the Council’s contractors, the Commissioner accepts that it is more likely that the balance of the public interest will favour withholding the information. He notes the public interest arguments in favour of disclosure but he believes that these are outweighed by the public interest in protecting the commercial interests of the Council’s current contractors. He is particularly influenced by the fact that the Council has informed him that it will shortly be inviting tenders for its homecare contracts. Disclosure of the hourly rates agreed with its current contractors would be likely to put them at a competitive disadvantage in that process as compared with other homecare providers that are intending to submit tenders. The Commissioner believes that it, in this case, there is a significant public interest in ensuring fair competition for the contracts. This in turn should help to ensure that the Council obtains best value in the proposed tendering exercise.
28. After weighing the public interest arguments, the Commissioner has therefore determined that the public interest factors in favour of withholding the requested information outweigh those in favour of disclosure and that, consequently, the withheld information is exempt from disclosure under section 43(2).
29. Having determined that the requested information is exempt from disclosure under section 43(2) on the basis of the prejudice to the commercial interests of the Council’s current homecare providers, the Commissioner has not considered whether section 43(2) is applicable to the potential prejudice to the commercial interests of the Council.

Right of appeal

30. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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